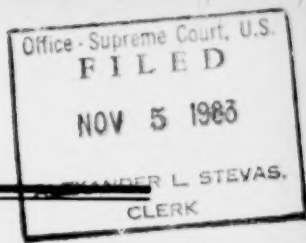


NO. 82-1330



IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

MORRIS L. THIGPEN, COMMISSIONER,
MISSISSIPPI DEPARTMENT OF CORRECTIONS, *et al.*,
Petitioners,

vs.

BARRY JOE ROBERTS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

CLEVE McDOWELL
Post Office Box 1205
Cleveland, Mississippi 38732
(601) 846-7050

Attorney for Respondent

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals applied the correct standard of review in holding that Respondent, Barry Joe Roberts, has a substantial double jeopardy claim under the United States Supreme Court's holding in *Illinois v. Vitale*, 447 U.S. 410, 65 L.Ed. 2d 228, 100 S. Ct. 2260 (1980) and under the Fifth and Fourteenth Amendments of the United States Constitution.

TABLE OF CONTENTS

	<i>Page</i>
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE.....	2
SUMMARY OF THE ARGUMENT.....	2
ARGUMENT—	
I. THE COURT OF APPEALS APPLIED THE CORRECT STANDARD OF REVIEW WHEN IT HELD THAT ROBERTS HAS A SUBSTANTIAL DOUBLE JEOPARDY CLAIM UNDER THE UNITED STATES SUPREME COURT'S HOLDING IN <i>IL-</i> <i>LINOIS V. VITALE</i> , 447 U.S. 410, 65 L.ED. 2d 228, 100 S. CT. 2260 (1980)	3
CONCLUSION.....	10

TABLE OF AUTHORITIES

CASES	<i>Page</i>
<i>Bacon v. Sullivan</i> , 200 F.2d 70 (5 Cir. 1952), cert. denied, 345 U.S. 910, 73 S. Ct. 651, 97 L.Ed. 1345 (1953).....	6
<i>Blackledge v. Perry</i> , 417 U.S. 21, 40 L.Ed. 2d 628 (1974).....	9
<i>Cutshall v. State</i> , 191 MS 764, 4 So. 2d 289 (Miss. 1941).....	6
<i>Illinois v. Vitale</i> , 447 U.S. 410, 65 L.Ed. 2d 228, 100 S. Ct. 2260 (1980).....	3,8
<i>Phillips v. State</i> , 379 So. 2d 318, 320 (Miss.) (1980).....	4
<i>Smith v. Smith</i> , 20 So. 2d 701, 704, (Miss. 1945).....	5
<i>State v. Stewart</i> , 223, N.W. 2d 1101 N.M. App. (1974) cert. denied, 423 U.S. 902, 96 S. Ct. 204, 46 L.Ed. 2d 134	6
CONSTITUTIONAL PROVISIONS	
Fifth Amendment to the United States Constitution	1
Fourteenth Amendment to the United States Constitution....	1
STATUTES	
28 USC §1254 (1)	1
CODES	
Miss. Code Ann. (1972) §63-3-1201.....	7
Miss. Code Ann. (1972) §97-3-47	7
Miss. House Bill No. 182 Chapter 466 (1983).....	9

OPINIONS BELOW

The Report and Recommendation and Orders of the United States District Court for the Northern District of Mississippi, which are unreported, are set out in the Appendix of the Petition For Certiorari at pages A1 to A6. The opinion of the United States Court of Appeals for the Fifth Circuit which is unreported, is set out in said Appendix at pages A7 through 13.

JURISDICTION

The judgment of the Court of Appeals was entered on November 16, 1982, (Petition for Certiorari, P. A7). The Jurisdiction of this Court rests on 28 USC §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Miss. Code Anno. § §63-3-1201, 97-3-47 and 99-35-1 et seq. (1972) are the State's laws involved in this cause.

U.S. Constitution Amendment V provides in part that:

. . . Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . .

U.S. Constitution Amendment XIV, Section One, provides that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the law.

STATEMENT OF THE CASE

The Respondent sets forth the same Statement of the Case as is set forth in the Brief for Petitioners herein.

SUMMARY OF THE ARGUMENT

This matter is before the Court on a grant of certiorari to the United States Court of Appeals for the Fifth Circuit. The principal issue presented for consideration focuses upon the question of whether the indictment and prosecution of the respondent for manslaughter by culpable negligence subsequent to convictions for offenses which require proof of the conduct that constituted the culpable negligence necessary for the manslaughter conviction, i.e., losing control of his vehicle while driving under the influence, crossing the centerline and colliding with the other vehicles, raises a substantial claim of double jeopardy.

The substance of the argument advanced by the respondent is that the conduct necessary to establish the culpable negligence for the manslaughter conviction was the same conduct for which the respondent had been convicted in the Justice of the Peace Court and therefore constituted double jeopardy.

Consequently, the Respondent submits that the Court of Appeals was correct in affirming the grant of habeas and the case should be affirmed.

ARGUMENT

THE COURT OF APPEALS APPLIED THE CORRECT STANDARD OF REVIEW WHEN IT HELD THAT ROBERTS HAS A SUBSTANTIAL DOUBLE JEOPARDY CLAIM UNDER THE UNITED STATES SUPREME COURT'S HOLDING IN *ILLINOIS V. VITALE*, 447 U.S. 410, 65 L. Ed. 2d 228 100 S. Ct. 2260 (1980).

Addressing the double jeopardy question, the District Court adopting the Magistrate's Report and Recommendation states:

"It is thus apparent that manslaughter by automobile in violation of Section 97-3-47 cannot be proved without at the same time proving 1201, and that conduct of Petitioner that constituted reckless driving — losing control of his vehicle while driving under the influence, crossing the centerline and colliding with the other vehicle — *is the same conduct that constituted the culpable negligence necessary for the manslaughter conviction.*" [Emphasis Added] (A 117).

In objecting to the Magistrate's Report and Recommendation the Petitioners' stated:

"Section 63-3-1201 and the conduct before the accident are considered "traffic offenses" in Mississippi. Those offenses consist wholly of the conduct of an operation of a motor vehicle upon the highways of this State and do not involve a wrongful homicide, an element altogether lacking in the traffic offenses." (A117).

Here, the Petitioners appear to be saying that the Respondent could have been convicted of manslaughter by culpable negligence without introducing and relying upon relying upon the conduct of the Respondent in the operation of his vehicle

before the accident. In short, the Petitioners are arguing that the "traffic offenses" were not used by the State in the prosecution to establish the criminal negligence, which must be wanton or reckless under circumstances implying danger to human life, necessary for an involuntary manslaughter conviction with a motor vehicle in Mississippi as was set out in *Phillips v. State*, 379 So. 2d 318, 320 (Miss. 1980).

"The Defendant, **BARRY JOE ROBERTS**, has been charged by an Indictment with the crime of manslaughter for having by culpable negligence caused the death of **BRENDA BONNER**. If you find from the evidence in this case beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis, consistency with innocence, that (a) the deceased, **BRENDA BONNER**, was a living person; and (b) that she died as a result of the Defendant's gross negligence demonstrating a reckless disregard for the safety of human life in operating a motor vehicle in a reckless manner, while under the influence of an intoxicant or alcoholic beverages, on the wrong side of Highway 35N while his operator's license had been revoked or suspended by the Department of Public Safety, and in hitting and striking a vehicle in which the deceased was a passenger, with the vehicle operated by the Defendant, then you shall find the Defendant guilty of Manslaughter. If the State has failed to prove any one or more of these elements, beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis, find the Defendant guilty" (A98, 99).

The State further by State's Instruction Number "2" clearly spelled out what the State considered "culpable negligence." That Instruction stated:

"Culpable negligence is, as used in these instructions, is conducted which exhibits or manifests a wanton or reckless disregard for the safety of human life, or such indif-

ference to the act under surrounding circumstances as to render his conduct tantamount to wilfulness." (A 99).

These two jury instructions clearly and unequivocally support the finding of the Magistrate. One of the misdemeanors of which Petitioner was convicted was reckless driving which is set out in Section 63-3-1301 of the Mississippi Code. It provides that:

"... That any person who drives any vehicle in such a manner as to indicate a wilful or wanton disregard for safety of persons or property is guilty of reckless driving."

In considering the Mississippi manslaughter statute, the District court found that:

Manslaughter is defined in general terms by Miss. Code Ann. Section 97-3-47 as "killing of a human being, by the act, procurement, or authority of law. . ."; with regard to manslaughter by automobile, the Mississippi Supreme Court has construed the statute to explain that "the gist of the offense of involuntary manslaughter with a motor vehicle is criminal negligence, which must be wanton or reckless under circumstances implying danger to human life, *Smith v. Smith*, 20, So. 2d 701, 704 (Miss., 1945), 'that is to say, in a wanton and flagrant disregard, automobile in violation of Section 63-3-121, and that the conduct of Petitioner that constituted reckless driving — losing control of his vehicle while driving, colliding with the other vehicle — is the same necessary for the manslaughter conviction. . .'" [Mag. rpt. and rec., P. 3]. (A 115 at A3 of Petition).

It is therefore urged that the conviction of the Respondent was based upon conduct for which he was tried upon as misdemeanors and which conduct was necessary as elements in the charge of manslaughter by automobile.

Three major cases raised by the Petitioners in support of their objections were *Bacon v. Sullivan*, 200 F.2d 70 (5 Cir. 1952), cert. denied, 345 U.S. 910 73 S. Ct. 651, 97 L.Ed. 1345 (A953); *Cutshall v. State*, 191 M. 765, 4 So. 2d 289 (Miss. 1941) and *State v. Steward*, 223 N.W. 2d 250 (1974), cert. denied, 423 U.S. 902, 96 S. Ct. 205, 46 L.Ed. 2d 134. In *Bacon v. Sullivan, Supra*, the Court analyzed the double jeopardy clause by indicating that the same act may constitute an offense against two separate statutes if additional elements of proof are required for conviction on the latter count. In the Magistrates Report, it was clearly indicated that the Mississippi Supreme Court had construed that manslaughter by automobile requires: “. . . criminal negligence, which must be wanton or reckless under circumstances implying danger to human life or limb. . .”, *id.* at A3 of Petition. The Respondent strongly urges that the analysis in *Bacon v. Sullivan, Supra*, is totally different from the elements of proof required in Respondent's case in that as Respondent previously pointed out that the State's Instruction included all of the misdemeanor convictions as elements. It states in part:

“ . . . b) That she died as a result of the Defendant's gross negligence demonstrating a reckless disregard for the safety or human life in operating a motor vehicle in a reckless manner, while under the influence of an intoxicant or alcoholic beverages, on the wrong side of Highway 35N while his operator's license had been revoked or suspended and striking a vehicle in which the deceased was a passenger with the vehicle operated by Defendant then you shall find the Defendant guilty of manslaughter. . .” (A 99)

The State's Instruction continued:

"If the State has failed to prove any one or more of these elements beyond a reasonable hypothesis consistent with innocence, then you shall find the Defendant not guilty." (A 99).

It is thus, again urged that in the *instant case*, manslaughter by automobile in violation of Section 97-3-47 cannot be proved without at the same time proving reckless driving in violation of Section 63-3-1201, and that the conduct of Respondent that constituted reckless driving — losing control of his vehicle while driving under the influence, crossing the centerline, and colliding with the other vehicle — is the same conduct that constituted the *culpable negligence necessary for the manslaughter conviction*.

In a second case raised by the Petitioners, *Cutshall v. State, Supra*, the case involved only one similar factual situation which was that the driver was driving under the influence of intoxicating liquor. This case clearly has a different factual basis from the instant case which used the misdemeanor conduct to establish the *culpable negligence necessary for the manslaughter conviction*.

The Court in that case further held that "... one may violate the law and yet not be culpable negligent in fact." This is a clear indication that in the *instant case*, as the State indicated in its Instructions to the Jury, other elements of negligence and recklessness were necessary to prove culpable negligence. The Respondent urges that the Magistrate's findings that the conduct covered by the Misdemeanor charges was the same as that used to establish the culpable negligence necessary to establish a manslaughter conviction in the instant case is a correct statement of the law.

A third case raised by the Petitioners, *State v. Steward, Supra*, is totally different as to its factual and legal basis. The Iowa case cite is based upon law in the State of Iowa which has no vehicular homicide statute. (*Stewart, Supra.*). Because Iowa has no statute covering this offense, it is urged that the findings in that case which rambled through cases and statements from Am. Jr. 2d and C.J.S. can be clearly distinguished from the instant case which has a statutory basis and a Judicial veneer requiring a showing of a culpable negligence which argument was adequately dealt with by the Magistrate in Report and Recommendations. (A 1, 2, 3, 4, of Petition).

In attempting to discredit the Magistrate's Report and Recommendations, the Petitioners tried to create the impression the Magistrate based his complete findings upon *Illinois v. Vitale*, 447 U.S. 410. 65 L.Ed. 2d 228 100 S. Ct. 2260 (1980). The Respondent directs the Court's attention to the Magistrate's comments in his Report and Recommendations at "A-2" wherein he states that "Guidance on this contention is found in *Illinois v. Vitale*. . . ." [Emphasis Added]. In the *Vitale* case, *Supra.*, there was a mere possibility that the State would rely on the ingredients included in the traffic offenses, whereas in the instant case, if the State had failed to prove any one or more of these elements, according to its own Instruction (S-1), the Petitioner could have been found not guilty. In the instant case, the traffic ingredients were necessary to establish culpable negligence and therefore, a conviction.

None of the cases raised by the Respondents in their Brief relate to legal decisions and issues involving involuntary manslaughter with a motor vehicle requiring by statute or judicial veneer, a showing of culpable negligence to sustain a conviction.

Since the granting of habeas in this case, the State of Mississippi has recognized that its prosecution herein is flawed and has enacted a manslaughter by vehicle statute. That statute, which is known as the "Drunk Driving Law," was passed as House Bill No. 182, Chapter 466, (1983) and at Section 13, states:

Every person who operates any motor vehicle in violation of the provisions of subsection (1) of Section 63-11-30 and who in a negligent manner causes the death of another or mutilates, disfigures, permanently disables or destroys the tongue, eye, lip, nose, or any other limb or member of another shall, upon conviction, be guilty of a felony and shall be committed to the custody of the State Department of Corrections for a period of time not to exceed five (5) years."

It should be noted that this law only carries a five (5) year maximum sentence whereas the culpable negligence statutes provide for a maximum sentence of twenty (20) years which is what the respondent received in the instant case.

Additionally, prosecution of the Respondent on the manslaughter charge violated his right to due process of law under the Fourteenth Amendment. *Blackledge v. Perry*, 417 U.S. 21, 40 L.Ed. 2d 628 (1974), which established a per se rule that a criminal defendant's right to due process is violated by the State substituting a felony charge for a misdemeanor charge covering the same conduct after the defendant exercised his right under state law to go to appeal and to trial de nova. The facts of this case fall squarely within *Blackledge*, under which Respondent is also entitled to relief.

CONCLUSION

The grant of habeas should be affirmed.

Respectfully submitted,

CLEVE McDOWELL, Esq.

P.O. Box 1205

Cleveland, MS 38732

Attorney for Respondent

Certificate of Service

I, Cleve McDowell, Attorney for Respondent, do hereby certify that I have this day served a true and correct copy of the foregoing brief for respondent to the following counsel:

Mr. Bill Allain, Attorney General

State of Mississippi

P.O. Box 220

Jackson, Mississippi 39205

(601) 359-3680

Mr. William F. Boyd, III

Special Assistant, Attorney General

P.O. Box 220

Jackson, Mississippi 39205

Attorney for Petitioners

this day of Nov. 1, 1983

A/K/A Cleve McDowell